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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GWENDOLYN L. SMITH,

Plaintiff and Appellant,

v.

ST. JOHN'S HEALTH CENTER,

Defendant and Respondent.

B235413

(Los Angeles County Super. Ct.
No. SC109488)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman B. Tarle, Judge. Affirmed.

Gordon Gordon Lawyers and Errol Jay Gordon for Plaintiff and Appellant.

Fonda & Fraser and Peter M. Fonda for Defendant and Respondent.

In this medical negligence action, plaintiff and appellant Gwendolyn L. Smith appeals from a judgment of dismissal entered on May 13, 2011, after the trial court sustained the demurrer of defendant and respondent St. John's Health Center (Health Center) to the second amended complaint (SAC). Smith contends it was an abuse of discretion to sustain the demurrer to the SAC without leave to amend, strike the second cause of action, and deny reconsideration of order striking the second cause of action. We affirm.

PROCEDURAL BACKGROUND

First Amended Complaint

On November 10, 2010, Smith filed a first amended complaint (FAC).¹ In the sole cause of action, Smith alleged the hospital was negligent, as follows (the hospital negligence allegations). On March 13, 2009, Smith underwent a left knee replacement at Health Center. On March 16, 2009, while receiving post-surgery care, Health Center's personnel "negligently and carelessly left [Smith] alone in her [hospital] room unattended while attempting to use the portable toilet for the first . . . time after surgery[.]" Smith fell from the portable toilet and suffered a ruptured tendon in her right knee, requiring her to immediately reenter surgery. Smith alleged she did not discover the cause of her fall within one year after its occurrence, despite making numerous efforts as follows (the delayed discovery allegations). She asked Health Center why she fell as soon as she regained consciousness, asked again after the surgery, and asked in writing when she was released from Health Center on April 15, 2009. She consulted with two law firms to obtain information, but the firms were unable to assist her. On September 22, 2009, Smith retained an attorney to file an action and conduct discovery. On March 3, 2010,

¹ The original complaint was filed September 3, 2010.

she served a notice of intent to sue Health Center.² Because Health Center refused to provide information, Smith commenced this suit without knowledge of why she fell.

Demurrer to FAC

Health Center demurred to the FAC on the ground of failure to state a cause of action, in that the cause of action was time-barred by the one-year prong of the statute of limitations in Code of Civil Procedure section 340.5 [statute of limitations for lawsuits alleging professional negligence].³ Health Center argued the statute began to run on March 16, 2009, when Smith suspected or reasonably suspected that Health Center's negligence caused the fall.

Opposition to Demurrer to FAC

Smith argued the one-year statute of limitations commenced once she engaged counsel to determine the cause of the fall. She contended that the issue of when she learned the cause of her injury was a question of fact. Smith requested leave to amend the complaint "for any deficiencies."

² The statute of limitations period for a medical malpractice action "may be extended by 90 days under Code of Civil Procedure section 364, which provides in pertinent part: '(a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action. [¶] . . . [¶] (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809.)

³ All references to statutes will be to the Code of Civil Procedure, unless specified otherwise.

Trial Court's Ruling on Demurrer to FAC

On March 8, 2011, the trial court sustained the demurrer to the FAC. The court found the one-year limitations period started to run on April 15, 2009, the date Smith alleged she made a written request to Health Center for information about why she fell. Smith asked for leave to amend in order to allege the statute of limitations was tolled while Health Center concealed information on causation, preventing Smith from learning whether Health Center was negligent in her fall. Commenting that Smith's reason for amending the complaint was "very thin," the court stated, "I'm going to give you one last chance, but that's all" and granted Smith leave to amend within ten days.

SAC Allegations

On March 16, 2011, Smith filed the SAC, which alleged two causes of action, medical malpractice and negligence. She alleged Health Center concealed information about the cause of her fall by failing to provide medical records she requested (the concealment allegations). In the first cause of action, for medical malpractice, she incorporated the hospital negligence, delayed discovery, and concealment allegations. She alleged Health Center breached its duty to provide proper post-operative care. In the second cause of action, for "general negligence," she incorporated the hospital negligence, delayed discovery, concealment allegations. She alleged Health Center breached its duty to provide proper post-operative care.

Demurrer to SAC

Health Center demurred to the SAC on the ground of failure to state a cause of action. Health Center argued it was improper for Smith to insert the second cause of action in the SAC, because the trial court did not grant leave to add a cause of action for

general negligence.⁴ Concerning the first cause of action for medical malpractice, the allegations of concealment did not toll the one-year statute of limitations.

Opposition to Demurrer to SAC

In an opposition filed May 2, 2011, Smith contended the demurrer should be overruled because, inter alia, Health Center's concealment estopped Health Center from asserting the statute of limitations as a bar to the action, the second cause of action was within the scope of the trial court's leave to amend, and the trial court did not limit Smith's leave to amend. Alternatively, Smith asked the court for leave to amend the complaint "for any deficiencies."

Simultaneously with filing her opposition to the demurrer to the SAC, Smith filed an application to add a second cause of action for general negligence. She explained she did not realize that she had a negligence cause of action until after the hearing on the demurrer to the FAC.

Trial Court's Ruling on Demurrer to SAC

On May 13, 2011, the trial court struck the second cause of action on the ground it was filed without leave of court. "[Smith] did not expressly ask the court for leave to add new causes of action, the court did not expressly permit leave to do so, and the new cause of action does not respond directly to the trial court's reasons for sustaining the earlier demurrer." The court denied Smith's May 2, 2011 application to add the second cause of action, because the application was procedurally improper pursuant to California Rules of Court, rule 3.1324.⁵

⁴ Health Center also argued the second cause of action was barred by the one-year statute of limitations in section 340.5.

⁵ All references to rules are to the California Rules of Court.

The trial court sustained the demurrer to the first cause of action without leave to amend. “Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first ‘discovers’ the injury and the negligent cause of that injury. Secondly, she must file within three years after she first experiences harm from the injury. . . . [¶] . . . [¶] . . . The one year limitations period begins when the ‘plaintiff suspects or should suspect that wrongdoing[.]’ [Citation.] The one year statute is tolled until plaintiff discovers the facts constituting the cause of action or, as a reasonable person, should have been put on inquiry that his or her injury was caused by the tortious wrongdoing. . . . [¶] And the fact remains that plaintiff was already suspicious, and was investigating, even while still at the hospital recovering from her fall, since after ‘regaining consciousness’ after the surgery after her fall, plaintiff ‘repeatedly asked the agents of Defendants as to the cause of her fall’ but that ‘Plaintiff also requested her medical records during her stay at the hospital, including records for treatment on the date of her fall on March 16, 2009. [Citation.] On April 15, 2009, plaintiff formally requested in writing that defendant ‘provide her with information, both written and oral, of the cause of her fall.’ [Citation.] [Health Center] did not respond to any of plaintiff’s requests. [Citation.] Under the circumstances, plaintiff had sufficient knowledge and suspicion to charge her with the responsibility to ‘conduct a reasonable investigation of all potential causes of that injury’ and with knowledge of the information that would have been revealed by such an investigation. [Citations.] Further, plaintiff still fails to allege specific facts showing (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. [Citation.] The statute of limitations therefore began running on April 15, 2009 and expired one year later on April 15, 2010. [Citation.] This action was not filed until September 3, 2010. The first cause of action is time-barred.”

The trial court rejected Smith’s contention that Health Center is estopped from asserting the statute of limitations because it violated a duty to provide medical records. Smith fell from a toilet, her injury was not concealed, and she began investigating

immediately. Smith cited no case that the statute is tolled while a plaintiff, “who was investigating her injury within days of the fall, yet nevertheless waits 17 months to file a medical malpractice action. Nor does plaintiff request or state how she can amend to cure.”

Proceedings After the Ruling Sustaining Demurrer to SAC

On May 16, 2011, Health Center served notice of the May 13, 2011 rulings.

On May 27, Smith filed an objection to Health Center’s proposed judgment of dismissal on the ground that, on May 31, 2011, she filed a motion for reconsideration of the May 13, 2011 orders. On May 31, 2011, she filed an objection to defendants’ proposed order on demurrer.

On May 31, 2011, Smith filed a motion to amend the SAC to include the general negligence second cause of action. Smith acknowledged the May 2, 2011 application to add the second cause of action was procedurally defective. Smith asked the trial court to exercise discretion under section 473, subdivision (a)⁶ and permit her to add the second cause of action for negligence, which would be timely under the general negligence statute of limitations. Smith stated that, on January 21, 2011, Health Center provided the following interrogatory answer: “On March 16, 2009, three days after [Smith’s] surgery, she was assisted to the commode and when she attempted to rise to clean herself, lost her balance, and fell to the floor striking her right knee.” Counsel reviewed this answer after

⁶ Section 473 provides in part: “(a)(1) The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.”

the demurrer to the FAC was sustained on March 8, 2009, and realized it raised an issue of general negligence.

On May 31, 2011, Smith also filed a motion for reconsideration of the May 13, 2011 order striking the second cause of action. Smith contended there was a new fact: she was filing a motion to amend SAC, which conformed to the requirements of rule 3.1324. She contended she did not know general negligence was the cause of her fall until Health Center served interrogatory answers. Smith argued the trial court abused its discretion under section 436 in striking the second cause of action as unauthorized.

Smith calendared both motions for August 17, 2011.

On June 16, 2011, the trial court dismissed the SAC. The demurrer to the first cause of action of the SAC was sustained without leave to amend on the ground it was barred by the applicable statute of limitations, section 340.5. Pursuant to rule 3.1324, the second cause of action was stricken on the ground it was improperly inserted in the SAC without leave of the court, and the application to add a general negligence second cause of action was denied as procedurally improper. On June 20, 2011, the court signed a judgment dismissing the action in its entirety.

On July 17, 2011, the trial court reviewed Smith's objections to the proposed order and judgment and "accepted the order and judgment."

On August 17, 2011, the trial court heard the motion for reconsideration and motion for leave to file a third amended complaint.⁷ The court held that, as judgment of dismissal was entered on June 20, 2011, it lacked jurisdiction to reconsider its prior order or grant leave to amend. "[E]ven if the court had jurisdiction to reconsider its prior order and consider the propriety of leave to amend, it would not grant plaintiff leave to amend to allege a separate cause of action for negligence which is equally barred by the statute of limitations of . . . section 340.5."

⁷ The trial court labeled the May 31, 2011 application for leave to amend the SAC a "motion for leave to file a third amended complaint."

DISCUSSION

I. The Action Is Barred By the Statute of Limitations

Smith contends the SAC sufficiently alleges the action for medical malpractice was timely filed based on a theory of delayed discovery. We disagree with the contention.

A. Standard of Review

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

B. Statute of Limitations

Section 340.5 provides in pertinent part: “In an action for injury or death against a health care provider based upon such person’s alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have

discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. . . . [¶] For the purposes of this section: [¶] (1) ‘Health care provider’ means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code[;] [¶] ‘Professional negligence’ means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.”

“In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period.” (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 809.)

C. The Allegations Do Not Support a Theory of Delayed Discovery

The allegations of the SAC show that, by April 15, 2009, Smith knew everything she needed to know to reasonably suspect her fall was caused by Health Center’s negligence. Moreover, she suspected Health Center’s negligence caused her fall. She alleged the fall occurred when she attempted to get up from the portable toilet. She alleged she was left alone, unattended, when she fell. She immediately began asking

Health Center why she fell and, on April 15, 2009, put her request in writing. The theory of her action is that Health Center was negligent in leaving her unattended when she was using the toilet. She did not allege a hidden cause, Smith knew she was unattended. The delayed discovery and concealment allegations do not support her theory that discovery was reasonably delayed until after she retained counsel, because she already knew why she fell and suspected Health Center was at fault.

D. Estoppel

Smith's contention that Health Center is estopped by concealment to assert the statute of limitations fails, because the allegations show she reasonably knew why she fell before Health Center refused to provide her with information relating to the fall.

E. The Second Cause of Action Is Time-Barred

Smith contends it was an abuse of discretion to strike the second cause of action, deny leave to amend to add the second cause of action, decline to reconsider the rulings striking the second cause of action and deny leave to add the second cause of action.⁸ These contentions are easily rejected.

A breach of duty based on a single set of facts cannot give rise to both professional and ordinary negligence causes of action. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 996-998.) "[T]he standard of care remains constant in terms of 'ordinary prudence' [D]enominating a cause of action as one for 'professional negligence' does not . . . distinguish a claim separate and independent from some other form of negligence. As to any given defendant, only one standard of

⁸ Smith misstates the record. The trial court made a substantive determination of her motion for reconsideration. It rejected her request to plead a separate cause of action for general negligence and held such cause of action was barred by the statute of limitations.

care obtains under a particular set of facts, even if the plaintiff attempts to articulate multiple or alternate theories of liability.” (*Id.* at p. 998.) “[T]he same factual predicate can[not] give rise to two independent obligations to exercise due care according to two different standards. [That] is a legal impossibility: a defendant has only *one* duty, measured by *one* standard of care, under any given circumstances.” (*Id.* at p. 1000.)

Smith alleged the same factual predicate for both causes of action against Health Center. She does not contend Health Center is not a “health care provider” (§ 340.5). Therefore, the trial court properly precluded Smith from pleading both a professional and general negligence cause of action, struck the general negligence cause of action, and declined to allow amendment to include the general negligence cause of action.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent St. John’s Health Center.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.